STATE OF MICHIGAN

IN THE SUPREME COURT

LISA TYRA

Plaintiff-Respondent,

Supreme Court No. 148087
Court of Appeals No: 298444
Lower Court Case No. 09-103111-NH

v.

ORGAN PROCUREMENT AGENCY OF MICHIGAN, a Michigan corporation d/b/a GIFT OF LIFE MICHIGAN, STEVEN COHN, M.D., DILLIP SAMARA PUNGAVAN, M.D., WILLIAM BEAUMONT HOSPITAL, a Michigan corporation, and JOHN DOE, believed to be Transplant Coordinator,

Defendants-Applicants.

SUPPLEMENTAL AUTHORITY BRIEF

In its Application, Defendant-Applicant Organ Procurement Agency of Michigan d/b/a Gift of Life advised this Court that the Court of Appeals had convened a special panel in *Furr v McLeod*, Court of Appeals Docket No. 310652 to consider some of the same issues as are present in this case. The majority opinion in *Furr* requested the special panel because it found that it had to follow the Court of Appeals decision in this case even though it believed that this case had been wrongly decided. (*See* Exhibit A: *Furr v McLeod*, Court of Appeals Docket No 310652 (Oct 24, 2013). The resolution of both *Furr* and this case depend upon how the following reported decisions of this Court and the Court of Appeals are interpreted:

1. *Burton v Reed City Hospital Corp*, 471 Mich 747; 691 NW2d 424 (2005), which held that the statute of limitations in a medical malpractice action was not tolled by filing a medical malpractice lawsuit before the notice of intent waiting period under MCL 600.2912b expired;

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2. *Bush v Shabahang*, 484 Mich 156; 772 NW 2d 272 (2009), which held that MCL 600.2301 authorized a trial court to allow a plaintiff to amend the content of a notice of intent;

3. *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), which held that MCL 600.2301 allowed it to find that filing a medical malpractice lawsuit one day early tolled the statue of limitations; and

4. *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), which held that *Burton* remains controlling law, that MCL 600.2301 only applies to pending actions or proceedings and that the holding in *Bush* applied only to the use of MCL 600.2301 to amend the content of a notice of intent.

In this case, the Court of Appeals majority relied upon *Zwiers* to find that MCL 600.2301 could allow the Plaintiff's to avoid the effect of filing a medical malpractice at least six weeks before the notice of intent period under MCL 600.2912b expired. 302 Mich App at 210, 226-227. In his dissent, Judge Wilder explained that *Driver* had overruled *Zwiers* and that the trial court had correctly granted summary disposition to Defendants-Applicants. 302 Mich App at 229-231.

In the original *Furr* majority decision, Judge Whitbeck stated that he believed that this case had been wrongly decided, but recognized that he was obligated to follow this case under MCR 7.215(C)(2). (Exhibit A, pp 1, 7-10, 13-14). Therefore, the original *Furr* majority agreed with Judge Wilder's conclusion that *Driver* had overruled *Zwiers*.

On April 10, 2014, the special panel of the Court of Appeals issued the decision in *Furr v McLeod*, ___ Mich App ___; ___ NW2d ___, Court of Appeals Docket No. 310652, 2014 WL 1394780 (April 10, 2014)(majority opinion attached as Exhibit B and dissenting opinions attached as Exhibits C and D). The majority of the Special Panel affirmed the original *Furr* decision and affirmed the decision by the trial court's reliance upon *Zwiers* to deny the defendants' motion for summary disposition. (Exhibit B, p 1).

The analysis of the *Furr* Special Panel was not that *Zwiers* clearly remained good law

after *Driver*. Instead, the *Furr* Special Panel affirmed only because it concluded that there was a "lack of clarity" in *Driver* as to whether this Court intended to overrule *Zwiers*. (Exhibit B, p 1). Under the current case law, the Special Panel majority did not believe it could hold "with any level of confidence" that *Driver* overruled *Zwiers*. (Exhibit B, p 1). Therefore, the Special Panel majority expressly left the question of whether *Driver* overruled *Zwiers* to this Court. (Exhibit B, pp 1-2).

The Special Panel decided the case by a narrow 4-3 majority. There were two dissenting opinions from the Special Panel in *Furr*. In the lead dissent, Judge O'Connell, joined by Judges Talbot and Meter, stated that they would reverse the trial court's decision in *Furr* for the reasons stated by Judge Wilder's dissent in this case and the original majority in *Furr*. (Exhibit C: O'Connell Dissent). Judge Meter also wrote a separate dissent because he had been a member of the panel that decided *Zwiers*, believed that *Zwiers* was well reasoned and also believed the *Driver* had overruled *Zwiers*. (Exhibit D: Meter dissent).

Therefore, rather than resolve the legal issues that are also present in this Application, the Special Panel in *Furr* raises additional questions that this Court should consider when reviewing this Application.

CONCLUSION

This legal issues raised by this Application, and the Application filed in *Furr*, have been reviewed by 13 different Court of Appeals judges in the past year. Five Court of Appeals judges (Judges Wilder, Whitbeck, O'Connell, Talbot, and Meter) concluded that this Court overruled *Zwiers* in *Driver*. Only three Court of Appeals judges (Judges Ronayne Krause, Stephens and Owens) have unequivocally found that *Zwiers* remains good law even after this Court issued *Driver*. The four judges (Judges Murphy, Markey, Borello and

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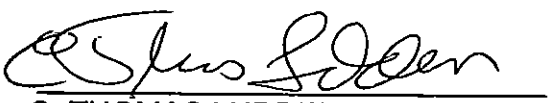
Beckering) in the *Furr* special panel majority recognized that this Court may have intended to overrule *Zwiers* in *Driver* and asked this Court to provide additional guidance on this issue.[1]

Given how narrowly *Furr* and this case were decided and the differing analyses on this contentious issue, this Court should grant this Application and provide the bench and bar with the additional guidance that is needed on the issues raised by this Application.

Respectfully submitted,

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

By: 

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[1] Judge Michael Kelly's position is not entirely clear from his concurrence in the original *Furr* decision.